



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.307 OF 2006**

**BETWEEN**

**FRANCIS DAWO KAWA ..... APPELLANT/APPLICANT**

**AND**

**TOBIAS OBILO ANDURU ..... RESPONDENT**

*(Being an appeal from the decision/ruling of the PM's Court at Migori, Hon. Ezra Awino dated 28<sup>th</sup> November 2006 in Migori PMCC NO.239 of 2004)*

**RULING**

1. The appellant/applicant has by way of a Notice of Motion dated 21<sup>st</sup> December 2012, brought under **Order 42 Rule 4 and 6** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** sought the following ORDERS:-

1. *Spent.*
2. *That pending the hearing and determination of this application inter partes or further orders of the court, this court do grant to the Applicant an order of interim stay of execution of the decree herein.*
3. *That the execution and the proceedings to enforce the judgment and decree herein be stayed pending the hearing and determination of an appeal filed herein.*
4. *The costs of this application be provided for.*

2. The application is premised on the grounds on the face thereof and supported by the affidavit of Geoffrey Yogo the Advocate of the appellant/applicant sworn on the 21<sup>st</sup> of December 2012. He states that the appeal was heard and judgment delivered on the 7<sup>th</sup> September 2012 dismissing it on the ground that there exists an appeal pending before the same court. Being dissatisfied with the judgment of this honourable court, the applicant/appellant instructed him to appeal against the said judgment particularly the finding that the appeal was an abuse of the court process because there existed another appeal.

3. The deponent also avers that the applicant fears and apprehends that should the said judgment and decree be executed then it would destroy the substratum of the application and the appeal. He opines that the respondent being a man of straw would be incapable of effecting a refund in case the appeal succeeds and if that happens then the applicant/appellant shall suffer substantial loss and damages.

4. He further states that the respondent has already filed an application to have the rent deposited in court

released to him without due regard to the judgment that half of the suit property was ordered to belong to the applicant/appellant.

5. He adds that the court failed to take into account the fact that the appeal being Kisii HCCA No.160 of 2006 had been withdrawn on 28<sup>th</sup> September 2008 before the application for review in the lower court that gave rise to the current appeal.

6. He maintains that the applicant is willing to abide by all reasonable conditions that this court may impose including depositing the rental amount at the disposal of the court. He concludes that on the land stand buildings constructed by the appellant without contribution of the respondent at all and the appellant stands to suffer irreparable damage if the same are demolished before the appeal is heard and determined.

7. The application is opposed. There is a replying affidavit by Tobias Obilo Anduru sworn on 3<sup>rd</sup> April 2013. He states therein that the application is frivolous, ill conceived and an abuse of the court process. That the application as drawn is incurably defective and bad in law and has been brought under wrong provisions of the law; it has not disclosed any reasonable grounds upon which the orders sought can be granted and the supporting affidavit to the application is incompetent and bad in law as it has been sworn by a person not authorized in law to swear it.

8. He states that there is no appeal attached to the supporting affidavit. He also says that the decree herein being of monetary value, the applicant has not deposited any security in court to warrant the orders sought. He further states that the applicant's allegations filed herein are meant to delay the cause of justice, and meant to deny the respondent the enjoyment of the fruits of his valid judgment.

9. The deponent maintains that he is a man of means since he owns various properties and business premises within Migori County thus able to refund the amount if the appeal succeeds. He also maintains that the applicant has not filed and/or served any appeal or notice of appeal as alleged and if the appeal is filed and/or served the same is unmerited and has no chances of success.

10. He adds that the applicant is not entitled to the orders sought since he failed to comply with the stay orders of execution as he defaulted in depositing the rent in court as ordered by this court on 8<sup>th</sup> May 2007. Further that the applicant has not shown or demonstrated the extent of damage or loss he may suffer if the orders sought in the application are not granted.

11. Finally the deponent of the replying affidavit states that the applicant has not satisfied any of the conditions that are required by the rules for the granting of the orders sought. He urges this court to dismiss the application with costs.

12. Parties canvassed the said application by filing and exchanging written submissions together with the authorities they were to rely on. The court has carefully read through both sets of submissions.

13. In the case of **Equity Bank Limited -vs- Est Link MBO Limited [2013] e KLR**, the Court of Appeal held that an appeal does not operate as a bar to execution of judgment. A party seeking stay of execution pending appeal must therefore demonstrate that they are not using the appeal to delay justice. They must not only show that they have an arguable appeal but also that they have come to court without undue delay. Those are the rules applicable in the Court of Appeal.

14. As held by Gikonyo J in the case of **Tarbo Transporters Limited -vs- Absalom Dova Lumbasi [2012] e KLR** the Court (Gikonyo J) held that stay of execution pending appeal is granted at the discretion of the court upon demonstration by the applicant that the application has been brought without unreasonable delay.

15. In the case herein, the application herein arises from the judgment delivered on the 7<sup>th</sup> September 2012. It is interesting to note that the application is supported by an affidavit sworn by the the appellant's/applicant's advocates on record.

16. In the supporting affidavit there is no evidence of any effort made by the appellant/applicant to prosecute the appeal. Notice of withdrawal according to the records is dated 28<sup>th</sup> December 2006 filed on the same date. I do agree with the respondent's submissions that by swearing the supporting affidavit, the advocate has put himself in the position of the applicant and is liable to cross examination on the averments in the affidavit.

17. Having noted the above I will not venture into the issue of technicalities as the constitution is very clear on the same. I will consider the issue as to whether substantial loss may result to the applicant if the orders sought are not granted and whether applicant has given any security for due performance of the decree. I have tackled in part what the court's position is where an application has been brought with unreasonable delay.

18. After carefully considering the circumstances of this case, this court is not satisfied that the appellant's/applicant's application dated 21<sup>st</sup> December 2012 is merited. The applicant/appellant has not demonstrated how he will suffer irreparably if the orders herein are granted. He has also not complied with previous orders granted by this court especially those requiring him to deposit rent into court. This court's orders should not be taken in jest as no court issues orders in vain. It will be futile to grant to the appellant/ applicant the orders sought in the application, because the history of the case shows that he is incapable of complying with court orders.

19. The upshot of what I have stated above is that this court finds the applicant's application lacking in merit. The same is dismissed with costs to the respondent.

20. The application dated 24<sup>th</sup> October 2012 by the respondent being unopposed, same is granted with no orders as to costs. These are the orders of this court.

**Dated and delivered at Kisii this 24<sup>th</sup> day of July, 2014**

**R.N. SITATI**

**JUDGE.**

Miss Nekesa for Mr. Ojuro for Appellant/Applicant

Mr. Ayienda for Nyagesoa for Respondent

Mr. Bibu - Court Assistant